UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:	Chapter 7 Case
Interior Wood Products Company,	BKY Case No. 3-89-1080
	ADV No. 3-90-194
Debtor.	
Sheridan J. Buckley, Trustee,	
Plaintiff,	
v.	MEMORANDUM ORDER
Jeld-Wen, Inc.,	
Defendant.	

This matter came before the Court on March 20, 1991, on motion of the Defendant for summary judgment. David W. Evans represents the Trustee. Richard D. Anderson represents Jeld-Wen, Inc. (Jeld-Wen). The Court has jurisdiction to hear and determine this matter pursuant to 28 U.S.C. Sections 157 and 1334, and Local Rule 103(b). This is a core proceeding pursuant to 28 U.S.C. Section 157(b)(2)(E) and (H). The Court, having considered the briefs, arguments of counsel, having before it all relevant and necessary information, and being fully advised in the matter, now makes this Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

The dispute between the parties follows a series of prepetition mergers and acquisitions involving Defendant Jeld-Wen, Inc. (Jeld-Wen), an Oregon Corporation. On June 30, 1988, Jeld-Wen acquired and merged with Ponderosa Mouldings, Inc. (Ponderosa), another Oregon corporation. Thereafter, Ponderosa operated as a division of Jeld-Wen. Jeld-Wen also owns 51% of the stock of Jordan Millwork Company (Jordan), a South Dakota corporation, making Jeld-Wen its controlling shareholder.(1)

Footnote 1
Defendant Jeld-Wen's pleadings describe Jordan as a "sister corporation," and some managers of Jeld-Wen appear to have responsibility for the affairs of Jordan. In particular, Douglas Kintzinger, manager of corporate development for Jeld-Wen, represented Jordan in its purchase of Interior's assets.
End Footnote

The Debtor, Interior Wood Products Company (Interior), was a Minnesota corporation, which manufactured and sold doors, windows,

wood millwork, and related products. In late 1988 and early 1989, Interior developed severe financial problems, and Jordan opened negotiations with Interior for purchase of its assets. Those negotiations resulted in Jordan's purchase of substantially all of Interior's assets on January 23, 1989. Ponderosa, as a division of Jeld-Wen, sold goods on account to Interior, and by January 23, 1989, Ponderosa was a prepetition unsecured creditor of Interior in the sum of $125,194.04. Jordan and Interior entered into an Asset Purchase Agreement (APA)2 by which Jordan would acquire substantially all of the assets of Interior for a total potential purchase price of $3,750,000.(3)

Footnote 2
The APA was prepared by Douglas Kintzinger in his capacity as Jeld-Wen's manager of corporate development.
End Footnote

Footnote 3
Exhibit A to the Bill of Sale prepared pursuant to the APA listed Interior's assets to be acquired by Jordan as:

...cash, cash equivalents, accounts receivable, inventory, raw material, work in process, finished goods, all real and personal property, including, but not limited to, land, buildings, machinery, equipment, rolling stock, supplies, spare parts, contract rights (including patents, ideas, and inventions), wherever located, owned or used by Interior Wood Products, Co. and necessary for the conduct of Interior Wood Products, Co.'s business."
End Footnote

The APA provided for payment out of the purchase price, at closing, the following two apparently unsecured debts of Interior:

Ponderosa Mouldings	$125,194.04
Farmland Industries	169,508.64
	$294,702.68

The Agreement also provided for the Debtor to transfer a life insurance policy it owned on the life of its chief executive officer, having a cash value of $106,064.58, to the officer, together with a cash payment of $134,797.22 out of the sale proceeds, in payment of a noncompete agreement between the officer and Jordan. An additional $15,000 was payable out of the sale proceeds to pay for a second noncompete agreement between Jordan and another employee of the Debtor. The total value, apparently transferred out of Debtor's pre-existing property and proceeds of the sale, for noncompete agreements between Interior's employees and Jordan was $255,861.(4)

Footnote 4
Curiously, the APA provides that $300,000 of the purchase price be allocated for the payment of noncompete agreements.
End Footnote

After application of the above payments, and after payment of claims of $1,786,543.10 that were apparently secured by the property of the Debtor sold, the remaining balance of the purchase price (less closing costs of $45,000) in the amount of $1,367,892.42 was placed in escrow by the Debtor's attorney pending certain post-closing adjustments.

Arthur Andersen, accountants, conducted an audit of the Debtor within 30 days after closing. Upon completion of its audit, Arthur

Andersen determined that the book value(5) of the Debtor's assets sold was $2,264,953. Jordan was entitled to claim a dollar-for-dollar credit against the escrow to the extent that the audited book value of Interior's current assets was less than $2,650,000, or the audited book value of all acquired assets was less than $3,550,000. The APA provided that the purchase price for the acquired assets be reduced by an amount equal to the larger of any such variance. Accordingly, Jordan claimed a credit against the escrow in the amount of $1,285,047, or the difference between the unadjusted figure of $3,550,000 and $2,264,953 value of assets sold.

Footnote 5
Book value is defined as the cost of an asset minus accumulated depreciation. For example, manufacturing equipment is put on the books at its cost when purchased. Its value is then reduced each year as depreciation is charged to income to permit a company to recover its cost, not to replace the asset or reflect its declining usefulness. John Downes and Jordan Elliot Goodman, Barron's Financial Guides, Dictionary of Finance and Investment Terms, p. 41 (2d ed. 1987).
End Footnote

Jordan claimed other credits against the escrow funds. Under the APA, the Debtor guaranteed collection of all accounts receivable acquired by Jordan from the Debtor in the transaction. Apparently, collection was short by $142,448.11 Finally, Jordan was entitled to ten percent (10%) annual interest, from the date of closing, on its credit entitlement. By July 1989, Jordan claimed entitlement in the total amount of $1,490,570.11, which was $76,145.30 short of the balance then in the escrow account.

Following consummation of the sale, on March 24, 1989, an involuntary bankruptcy petition was filed against the Debtor by several unsecured creditors. An order for relief was entered on May 9, 1989.

In this action, the trustee seeks to recover, as a Section 547 preference, the payment made to Ponderosa at the closing pursuant to the APA. The Trustee argues that payment of Interior's debt to Ponderosa out of the purchase price paid by Jordan was an avoidable preference, which allowed Jeld-Wen to obtain more than it would have received had Interiors been a Chapter 7 debtor at the time, and had the transfer not been made. The Trustee claims that, as a result of the transaction, Jeld-Wen's position was materially improved at the expense of other similarly situated general unsecured creditors of the Debtor.

Jeld-Wen seeks full or partial summary judgment in its favor. The Defendant claims that the funds used to pay the $125,094.04 Ponderosa debt would never have been available to general unsecured creditors. Jeld-Wen first argues that the payment was not really made out of the sale proceeds, but that the sale price was artificially inflated to accommodate the payment, which Jordan decided to make for reasons involving the internal affairs of the corporate affiliates.

Furthermore, Jeld-Wen argues, Jordan's right to escrow credits ultimately entitled it to the entire escrow account, leaving a deficiency in the amount of $76,145.30. Jeld-Wen claims that, had the payment not been made, Jordan, not the Debtor, would have been the beneficiary of at least the amount of the deficiency. Accordingly, Jeld-Wen argues, its improved position over other general creditors could in no event be more than $49,048.74, which is the difference between the $125,194.04 payment and the

$76,145.30 deficiency.

The record does not support full or partial summary judgment for the Defendant.

II.

Paragraph 4 of the APA provides, in pertinent part:

> 4.1 Price. Subject to the adjustment provisions provided in Section 4.2 and 4.4 below, as the purchase price for the Acquired Assets, Buyer shall pay to Sellers the total sum of Three Million Seven Hundred Fifty Thousand and No/ 100ths Dollars ($3,750,000.00) (hereinafter referred to as "Purchase Price"), payable, at closing, as follows:
>
> a) Assumption of the liabilities...[Ponderosa Mouldings unsecured debt, Farmland Industries unsecured debt, and closing costs], not to exceed Three Hundred Thirty-Nine Thousand Six Hundred Eighty-Nine and 66/100ths Dollars ($339,689.66).

The clear and unambiguous language of the APA sets the initial price for the acquired assets, and provides that Defendant Jeld-Wen was to be paid its antecedent unsecured debt from the funds paid by Jordan at the closing toward its purchase of Interior's assets. The supporting closing documents disclose that Jordan paid the sum of $3,750,000.00 to the attorney for the Debtor, who then made the disbursements and established the escrow pursuant to the APA.

The Defendant argues that the real agreement of the parties was that Jordan was actually purchasing the assets of the Debtor for book value only, and that the payment to Jeld-Wen was the result of a unilateral decision by Jordan for Jordan to satisfy the debt owing its affiliate in this manner for internal corporate purposes. The Defendant offers the affidavits of Douglas Kintzinger and John Ristine in support of its position. John Ristine was president of the Debtor and received $134,797.22 as partial consideration for a noncompete agreement, from the funds paid by Jordan at the closing.(6) Kintzinger performed services at the time for both Jordan and the Defendant. Although these affidavits are arguably sufficient to withstand a motion for summary judgment by the Plaintiff, they simply cannot support the Defendant's motion for judgment, under the apparent circumstances of the case.

Footnote 6
Transfer, by the Debtor to Ristine, of title to the life insurance policy that was owned by the Debtor, and of payment to him of $134,797.22 from funds received for the purchase of the Debtor's assets, appears on the face of the transaction to have been a transfer by the Debtor for which it received no value. Under the Plaintiff's theory of the case, which seems to be supported by the clear and unambiguous language of the relevant documents, the transfer appears to have been a fraudulent conveyance, avoidable by the Trustee under 11 U.S.C. Section 548. Unsurprisingly, Ristine supports the Defendant's view of the sale/ purchase.
End Footnote

Defendant points to paragraph 4.2 as conclusive evidence that all that was really involved in the deal between Jordan and the Debtor was the purchase of assets at book value. However, paragraph 4.2 simply provides a formula by which the purchase price of $3,750,000 is to be adjusted, the calculation being with reference to book value.

Alternatively, Defendant argues that its position could only

have been improved over other similarly situated unsecured creditors, as a result of the transfer, by the amount of $49,048. Jeld-Wen seeks summary judgment limiting its potential liability by that amount, in the alternative to complete relief. However, partial summary judgment is not appropriate.

The purpose of preference law is to protect against the unfair prepetition diminution of an estate by a single unsecured creditor at the expense of other similarly situated creditors. However, Section 547 does not necessarily limit recovery of a preference to only that portion of a particular transfer that a trustee can precisely show would otherwise have been available for general unsecured creditors. Indeed, the statute allows the trustee to recover transfers measured by the difference between what the transferee actually received compared to what the transferee would have received in a Chapter 7 case had the transfer not been made. See: 11 U.S.C. Section 547(b)(5). The question of lost opportunity for similarly situated unsecured creditors is a judicial inquiry made to test the transaction against the equitable premise of the statute. That inquiry is not determined by a mathematically applied formula.

Here, the transfer at issue is one item in a basket of apparently preferential and fraudulent transfers that arguably arose out of Jordan's purchase of the Debtor's assets. Jordan's credit entitlement resulted in an ending deficit in the escrow through reduction of the purchase price. However, recovery by the trustee of all apparent preference and fraudulent transfers, or even some, would result in a net positive figure exceeding the amount of this particular transfer. For instance, the Farmland Industries transfer is presently being challenged in the amount of $169,508.64, through a separate adversary proceeding.

At best, summary judgment limiting the amount of recoverable preference in this action on a "benefit to creditors" theory would be premature.

III.

Based on the foregoing, IT IS HEREBY ORDERED: the Defendant's motion for summary judgment is denied.

Dated: June 12, 1991. By The Court:

Dennis D. O'Brien
U.S. Bankruptcy Judge